IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 639 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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INAYAT KALUBHAI GOVLI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR AM PRAEKH for the appellant.
MR HM PRACHCHHAK, APP, for the respondent.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 10/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be convicted for an offence punishable

under Section 302 of Indian Penal Code for murder of Shamsherbeg and came to be sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/-, and in default, to undergo simple imprisonment for a period of two and a half years by judgment and order dated 9.4.1997 of learned Additional Sessions Judge, Mirzapur, Ahmedabad, in Sessions Case No.143 of 1995.

2. The prosecution case is that the appellant along with several other persons formed an unlawful assembly around 23.30 hours on 30th March, 1995, at the Kabrastan hutments, near Camp Sadarbazar area of Ahmedabad. The common intention of the unlawful assembly was to commit murder of deceased Shamsherbeg and, in furtherance of that common intention, the appellant caused fatal injuries to the deceased with an iron strip, ordinarily used for cutting ice. The incident came to be witnessed by Saidabibi Akbarbhai, Akbarbeg Noorbeg, Jalalbhai Akbarbhai, Jenabibi Chhotubhai, Munnabhai Chhotubhai, Wahidbhi Akbarbhai and Salim Chhotubhai Shaikh.

2.1 On the day of the incident, as per the prosecution case, there was some dispute between Jenabibi and Merubibi. Since Murubibi started using abusive language against Saidabibi, she and her son-Shamsher went to Merubibi and asked as to why she had used such an abusive language. In retort, Merubibi said that Saidabibi and others are unnecessarily instigating her daughter for marriage. There was altercation and scuffle. In the scuffle, Pirmahmmad, Altaf, Merubibi, Salma and Inayat were involved and then

Inayat (the appellant herein) brought the muddamal iron strip and inflicted a blow in the chest of the deceased. The deceased fell down and the appellant went away. Ultimately, the deceased was taken to Civil Hospital, where he succumbed to the injuries. Police was informed by the Hospital Authorities and an F.I.R. was lodged by Saidabibi soon after the incident. An offence was registered and the matter came to be investigated upon. The Investigating Officer, having found sufficient material against the appellant and several other persons, filed charge sheet against them in the Court of learned Judicial Magistrate, First Class, Ahmedabad (Rural), who, in turn, committed the case to the Court of Sessions as the offences alleged were triable exclusively by a court of Sessions and Sessions Case No.143 of 1995 came to be registered.

2.2 Charge was framed at Ex.3. The accused persons pleaded not guilty to the charge and came to be tried. The Sessions Court, ultimately, came to a conclusion that the charges against accused, Pirmahmmad Kalubhai, Altaf Pirmahmmad and Merunisa Pirmahmmad were not proved and, therefore, acquitted them. However, the Trial Court came to be a conclusion that charges against accused No.4-Inayat Kalubhai Gavli, the present appellant, were duly proved by the prosecution and, therefore, the Court recorded conviction and inflicted the punishment, as stated above.

2.3 It would be appropriate to make a note of the fact that, in all four persons came to be tried by the Court of Sessions and one accused, Salma, who

was a juvenile, was tried by Juvenile Court. The convicted accused, Inayat Kalubhai Gavli, has preferred this appeal.

3. Learned Advocate, Mr. Parekh, for the appellant has raised following contentions :-

3.1 That the investigation is not properly done. The F.I.R. by Saidabibi is not the real F.I.R. because prior to the registration of the F.I.R., a Vardhi in respect of the same offence came to be registered and, therefore, that Vardhi would be the first information. Mr. Parekh submitted that, if that Vardhi is seen, name of the appellant does not appear and no allegation is made against him.

3.2 The second point that is raised by learned Advocate, Mr. Parekh, is that the prosecution has failed to establish link between the weapon allegedly used for commission of the crime and the appellant. He submitted that the Panch witnesses, in presence of whom the appellant is alleged to have discovered the weapon, have not supported the prosecution case. He further submitted that the F. S. L. report, if seen, would clearly indicate total absence of blood stains on the weapon in question. Mr. Parekh, therefore, submitted that the link between the accused and the weapon is not established by the prosecution.

3.3 The third contention is that the evidence of eye-witnesses suffers from the defect of contradictory versions, particularly, on question of sufficiency of light at the time and place of the incident and identity of the assailant. Mr. Parekh submitted that, according to the eye-witnesses, they had seen the incident and that there was sufficient light, but the Investigating Officer, in terms, deposed that, as the light was insufficient, the Panchnama of the place of offence was not possible to be drawn immediately after the incident and, it was drawn only in the next morning.

3.4 Mr. Parekh, therefore, submitted that, because of these defects in the prosecution case, the Trial Court ought to have acquitted the appellant along with other acquitted accused persons. He submitted, by way of alternative plea, that the case would fall under exception 4 of Section 300 of I.P.C. He took us through the record and proceedings to show presence of necessary ingredients therefor. Mr. Parekh submitted that, if the Court is of the view that the prosecution has been able to establish the involvement of the appellant in the offence, the conviction may be reduced from one under Section 302 to one under Section 304, Part-II of I. P. C. and the appeal, to that extent, may be allowed.

4. The appeal is opposed to by learned Additional Public Prosecutor, Mr. Prachchhak. He submitted that the appellant has rightly been convicted by the Trial Court after taking into consideration of relevant aspects. Mr.

Prachchhak submitted that whether the Vardhi is the first information or whether it is the F. I. R. lodged by Saidabbibi is the first information may not be of much significance once the prosecution is able to prove the occurrence of the incident and the involvement of the appellant in the incident. Mr. Prachchak submitted that the Panch witnesses not supporting the case of discovery of weapon itself would not damage the case of the prosecution either because, if the involvement of the appellant is proved through eye-witnesses, non-discovery of weapon also would not be fatal to the prosecution case. Mr. Prachchhak submitted further that the contradiction between the version of the eye-witnesses and the other witnesses is also not a contradiction in fact. He submitted that, it is true that the Investigating Officer found that the light was not sufficient to draw a Panchnama of the place of the incident. But that would not mean that the light was so insufficient that the eye-witnesses could not have seen the incident or that they could not have identified the assailants, particularly when the assailants were known to the eye-witnesses.

4.1 So far as the contention regarding the case falling under exception 4 of Section 300 is concerned, Mr. Prachchhak submitted that the appellant had no reason to involve himself in the incident. The dispute, which was going on, was between the appellant's family and the mother of deceased-Shamsherbeg and her family. Mr. Prachchhak submitted that the appellant is proved to have used a weapon and caused injury on vital part of the body of the deceased. Mr. Prachchhak submitted that it is not a case of single blow,

but two successive blows were given by the appellant to the deceased. The deceased was able to dodge one blow, but the other he could not, which proved to be fatal. The injury on hand of the deceased is a defensive injury and, therefore, the case cannot fall in exception 4 of Section 300 of I. P. C. Mr. Prachchhak submitted that the appeal may, therefore, be dismissed.

5. We have been taken through the record and proceedings of the case by learned Advocate, Mr. Parekh, as well as learned Additional Public Prosecutor, Mr. Prachchhak.

6. From the record, it transpires that the prosecution has examined following witnesses :-

(1) P.W. No.1-Saidabibi Akbarbhai Mirza, at Ex.13.

(2) P.W. No.2-Akbarbeg Noorbeg Mirza, at Ex.15.

(3) P.W. No.3-Dalpatbhai Amtabhai Makwana, at Ex.17.

(4) P.W. No.4-Jalalbhai Akbarbai Mirza, at Ex.19.

(5) P.W. No.5-Jayanti Dhanaji Parangji, at Ex.20.

(6) P.W. No.6-Pyarelal Pancham Kanojiya, at Ex.23.

(7) P.W. No.7-Dr.Vinayakrao Vasudevbhai Patil, at Ex.25.

(8) P.W. No.8-Jenabibi Chhotubhai, at Ex.28.

(9) P.W. No.Munna Chhotubhai, at Ex.29.

(10) P.W. No.10-Wahidbeg Akbarbeg, at Ex.30.

(11) P.W. No.11-Pinakin Madhusudan Acharya, at Ex.31.

(12) P.W. No.12-Mukesh Nandshankar Joshi, at Ex.33.

(13) P.W. No.13-Dr. Anilkumar Madhukantbhai, at Ex.36.

(14) P.W. No.14-Salim Chhotubhai Shaikh, at Ex.38.

(15) P.W. No.15-Bharatsing Devsing, at Ex.39.

(16) P.W. No.-16-Jaswantsinh Kacharaji Chavada, at Ex.44.

7. It transpires that the prosecution has relied on following documentary evidence:-

(1) Charge, at Ex.3.

(2) Inquest Panchnama, at Ex.10.

(3) Arrest Panchnamas, at Ex.11 and Ex.42.

(4) F. I. R. at Ex.14.

(5) Panchnama of clothes of the deceased, at Ex.18.

(6) Panchnama of scene of offence, at Ex.21.

(7) Panchnama of muddamal weapon, at Ex.24.

(8) Postmortem Note, at Ex.26.

(9) Certificate regarding cause of death, at Ex.27.

(10) Chemical Analyst's Report, at Ex.32.

(11) Chemical Alanyst's Report, at Ex.34.

(12) F. S. L. Report, at Ex.35.

(13) Serological Report, Ex.37.

(14) Receipt issued by F.S.L. on receiving the muddamal article, at Ex.45.

8. Out of the witnesses examined, P.W.1-Saidabibi Akbarbhai Mirza (Ex.13), P.W.2-Akbarbeg Noorbeg Mirza (Ex.15), P.W.8-Jenabibi Chhotubhai (Ex.28), P.W.9-Munnabhai Chhotubhai (Ex.29) and P.W.10-Wahidbhai Akbarbhai (Ex.30) are eye-witnesses to the incident, who have supported the prosecution case in toto and have remained unshaken during cross-examination.

8.1 P.W.4-Jalalbhai Akbarbhai Mirza and P.W.14-Salim Chhotubhai Shaikh (Ex.38) are eye-witnesses, who have not supported the prosecution case. Out of the rest of the witnesses, Panch witness-Jayantibhai Dhanjibhai (Ex.20) supports the prosecution case as Panch witness to the Panchnama of scene of offence. Dr. Vinayak Vasudev Patil (Ex.24) has supported the prosecution case. Likewise, P.W.11-Pinakin Madhusudan Acharya (Ex.31), P.W.12-Mukesh Nandshanker Joshi (Ex.33) and P.W.13-Dr. Harin Madhukant (Ex.36) are expert witnesses from the F. S. L.

9. P.W.1-Saidabibi (Ex.13) is the mother of the deceased. She happens to be an eye-witness to the incident. She said that on 31st March, at about 11.00 P.M., Jenabibi and Merubibi were quarrelling over their right to dry clothes. In that, when Murubibi started abusing, the witness herself and her son, Shamsher, went there to ask them as to why are they giving abuses.

The reaction of Merubibi was that the deceased and her mother were instigating the daughter of Merubibi for marriage and then she started beating. In their physical assault, Pirmahmmad, appellant-Inayat, Altaf, Merubibi and Salma were involved. Inayat (appellant) brought an iron strip used for breaking ice and pushed it into the chest of Shamsher. An injury was also caused on left hand of the deceased. The deceased fell down because of the injuries. There was commotion and Inayat, therefore, ran away after throwing the iron strip. The witness said that the iron strip was about one foot long. The deceased was taken to hospital, where he expired during the course of treatment. The witness identified muddamal article No.9 as the weapon used for commission of the offence.

9.1 The witness was cross-examined on the aspect of topography and on the question of sufficiency of light. The witness admitted that since the hutments were illegal, there was no facility for light and water. The witness is unable to say whether the night on which the incident had occurred was a moonless night, but she volunteered to say that the street tube-lights were on. Questions to assail the character of witness-Jenabibi were also put. A suggestion was put to the witness that, out of the crowd, who caused which injury was not noticed by the witness, which she denied. The F.I.R. is producted at Ex.14.

10. Witness-Akbarbeg Noorbeg was examined at Ex.15. His version

about the incident is the same as that of Saidabibi. Then he adds that the accused persons other than the appellant had caught hold of the deceased. In the meantime, the appellant went into his house and brought the muddamal iron strip and caused injury to the deceased in his chest. The witness said that the first injury was sustained by the deceased on his hand while trying to defend himself, but the second injury could not be dodged and he succumbed thereto. During cross-examination, he admitted that he had stated before the Police that the deceased-Shamsher had told the doctor that he was assaulted upon with an iron strip by Inayat. He said that, he went to the police cabin in the hospital to give information. Thereafter, the police arrived and took Vardhi.

11. The third supporting eye-witness is Jenabibi (Ex.28). She said that when the incident occurred, she was present. First there was altercation. Thereafter, Merunisa caught hold of her hair and so also son of Merunisa. Shamsher had come to her rescue. Samsher was caught hold of by one of the sons of Merunisa and husband of Merunisa. She was not sure as to with which weapon Inayat caused injury to the deceased as it was dark. She denied the suggestion that she did not state before the police that Merunisa had caught hold of her hair so also son of Merunisa and that deceased-Shamsher rescued her.

12. The next eye-witness, who supports the prosecution case, is

Munnabhai Chhotubhai (Ex.29). He also, in terms, implicated appellant-Inayat and stated that Inayat had caused the injury to Shamsher. The witness was cross-examined, but nothing turns out of it.

13. The next witness is Wahidbeg Akbarbeg (Ex.30). He claims to have seen the appellant giving blows in chest and left hand with something like an ice breaker. He said that the other accused persons had caught hold of Samsher and injury was caused by Inayat. He, however, identified muddamal article No.9 as the weapon used for causing injury to the deceased. He was also cross-examined and he denied the suggestion that he had not seen the incident.

14. What emerges from these pieces of evidence is that the prosecution case is supported by these witnesses. Out of these witnesses, Jenabibi Chhotubhai is an independent witness and all of them have, in terms, stated that the appellant caused the fatal injury to the deceased as well as injury on his arm, which was caused to the deceased in his attempt to defend himself against a blow inflicted by the appellant.

14.1 It also transpires from evidence of these witnesses that the appellant had no axe to grind against the deceased. There was no animosity, there was no quarrel and there was no dispute between them. Even when the incident occurred, the deceased and his mother went to tell Merubibi not to

use abusive language and the appellant had no reason to interfere. He is alleged to have given the iron strip blow which was taken by the deceased on his hand in an attempt to defend himself. The appellant even inflicted another injury which the deceased could not dodge and the blow landed in chest of the deceased, to which the deceased, ultimately, succumbed. Nothing turns on cross-examination of these eye-witnesses and, therefore, the Trial Court was justified in coming to the conclusion that the prosecution was successful in proving involvement of the appellant in the incident and establishing the link between him and the fatal injury to the deceased.

15. With this overwhelming evidence of eye-witnesses, in our opinion, whether telephone Vardhi is the F.I.R. or Exhibit 14 is the F.I.R. becomes insignificant. The significance from the point of view of the appellant is that the Vardhi does not contain name of the assailant or to be more precise, the name of the appellant and, therefore, the appellant could not be said to have committed the offence. The F.I.R. is only an instrument to set the investigation machinery into motion and it is not always necessary that it must contain all relevant details. The contention of Mr. Parekh, therefore, cannot be accepted.

16. The prosecution then examined Dr. Vinayak Vasudev Patil, who had performed the postmortem of the deceased. He opined that the injury is sufficient in the ordinary course of nature to cause death and death has

occurred. Considering the site of injury and the nature of injury, it is clear that the doctor's opinion deserves acceptance.

17. The contention regarding the prosecution having failed to establish link between the weapon and the accused also does not merit acceptance because it is always not necessary that the weapon must be traced and/or that the link between the weapon and offence must be established. In the instant case, the Discovery Panch Witnesses have not supported the prosecution case. The result, at its best, is that the prosecution has not established the discovery part at the hands of the accused through independent Panch witnesses, though the Investigating Officer does establish this aspect. Assuming that it is not established to the hilt, it would also indicate that the prosecution could not prove the factum of concealment of the weapon and discovering it by the accused. But the version of eye-witnesses is so overwhelming that this factor becomes insignificant.

18. As regards sufficiency or insufficiency of light, it may be noted that the Investigating Officer has stated in his deposition that the Panchnama of place of offence could not be drawn as the light was not sufficient. It is canvassed that, if the light was insufficient, the eye-witnesses could not have seen the incident. This contention is totally meritless. There is a difference between light insufficient to make minute observation and reduce it into writing by drawing a Panchnama and seeing an incident occur and seeing a

person assaulting another. The difference becomes more significant when the persons involved in such incident are previously known to the eye-witnesses. Apart from this, during cross-examination, one of the eye-witnesses said that there was a street light switched on which would only mean that there was some light which might not have been found sufficient by the Investigating officer to make minute observation of the place of incident and to draw a Panchnama. We, therefore, do not accept this contention either.

19. Now comes the question as to whether the alternative prayer made by the learned Advocate for the appellant can be accepted, namely, that the case would fall in exception 4 to Section 300 of I. P. C.

19.1 The picture that emerges from the deposition of eye-witneesses is that the dispute was between Jenabibi and Merubibi and because Merubibi started using abusive language against Saidabibi, she and the decesased-Shamsher went there to ask as to why they were using abusive language. The appellant was not involved in the incident at all. He had no reason to involve himself in the quarrel nor is there anything found that he was gripped by the heat of passion. When he assaulted the deceased, he did not stop at one blow. He gave at least two successive blows, one of which could be dodged by the deceased and the second proved to be fatal and, therefore, though the incident occurred without premeditation, it cannot be said that it occurred because of sudden quarrel between the appellant and the deceased. There is no material

to draw any inference that the appellant was gripped by the heat of passion. From the entire record, we do not find any material, even in the form of a suggestion to the eye-witnesses, which would be sufficient to bring the case within the ambit of exception 4 of Section 300 of I. P. C. There is no cross-examination on this aspect. There is no suggestion on this aspect. It is only during the course of arguments that a contention is raised before the Trial Court as well as this Court. It is, therefore, not possible to accept this contention.

20. At this stage, it would also be appropriate to record that in the statement under Section 313 of the Code of Criminal Procedure, the accused did not advance this theory. He, totally, refused his involvement in the case and came out with a case that somebody had murdered the deceased and then thrown the dead body on the ground. Viewing all these factors collectively, we are of the clear opinion that the case cannot fall in exception 4 of Section 300 of I. P. C.

20.1 It is also worth a note that the appellant gave repeated blows, at least twice. He was armed with a weapon. The deceased dodged one blow, still another blow was given by the appellant and, therefore, it cannot be said that he did not take any undue advantage of the situation.

21. It was contended by the learned counsel for the appellant that

the prosecution has not produced the cross-complaint, although the Investigating officer, in his examination-in-chief, stated that there was a cross-F. I. R. in respect of the same incident. This contention can be of no help to the appellant for the reason that the copy of that F.I.R. is not got produced by the appellant either through the Investigating Officer or by examining the defence witnesses or in his statement under Section 313 of the Code of Criminal Procedure, and in absence of the F.I.R., it is not possible for this Court to know the contents thereof or to draw any inference about the possibility of the case falling in exception 4 of Section 300 of I. P. C.

22. From the discussion made in the foregoing paragraphs, we find that the Trial Court was justified in recording conviction of the appellant and sentencing him to life imprisonment. We do not find any merit in the appeal. The appeal must fail and stands dismissed. The judgment and impugned in the appeal is hereby confirmed.

[A. L. DAVE, J.]

[S. R. BRAHMBHATT, J.]

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